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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BEVERLY SEVCIK et al., Plaintiffs, vs. BRIAN SANDOVAL, etc., et al., Defendants, and COALITION FOR THE PROTECTION OF MARRIAGE, Intervenor-Defendant.	Case No.: 2:12-cv-00578-RLH-PAL **1. THE COALITION'S OBJECTION TO "STIPULATED DISCOVERY PLAN AND SCHEDULING ORDER"** **and** **2. APPENDIX IN SUPPORT**

I. Introduction

On Friday, June 1, 2012, the plaintiffs made two filings – their opposition to the Coalition's motion to intervene (D.I. 40) and their proposed scheduling order ("PSO") (D.I. 39) (collectively "Filings"). This is the Coalition's Objection to the PSO. We are also filing a Reply in support of the Coalition's motion to intervene. We mention that fact here for two reasons: First, the Filings share a common objective: with the Filings, the plaintiffs are attempting to kill the chance, at the very outset of this litigation, that this Court will be fully advised of the full range of societal and hence governmental interests sustaining the constitutionality of Nevada's Marriage Amendment. Second, to fully understand the mischievous nature of the PSO, one needs to understand what we say in our Reply in support of the Coalition's motion to intervene. Accordingly, we respectfully request the Court to review that Reply before reviewing this Objection, which on some important points will only briefly summarize what the Reply addresses in full.

Here is a summary of the important points made in full in the Reply:

1. The real and ultimate issue in this case is whether sufficiently weighty and important societal and hence governmental interests sustain Nevada's Marriage Amendment – which perpetuates the man-woman meaning at the core of our marriage institution – against the plaintiffs' constitutional attack on it.
2. A number of social institutional realities ("marriage facts") comprising what is known as the social institutional argument for man-woman marriage establish that society's and hence government's interest in preserving the man-woman meaning are compelling and therefore that the Marriage Amendment can withstand constitutional attack, regardless of the level of judicial scrutiny employed.

3. The marriage facts are just that, facts, and are of a nature that they are the fit subject of Rule 702 expert witness testimony. Indeed, the only way to get these facts into the record is by way of expert testimony (in the absence of stipulation, which seems highly unlikely in this case).

4. The other ways in which a judge can create some purportedly "factual" basis on which to assess the man-woman meaning's constitutionality is by use of (i) unproven fundamental premises and/or (ii) so-called "legislative facts." But both of those ways amount, in practice, to a judge conjuring up a notion of what marriage is (or should be) on nothing other than his own worldview and personal experiences. Judges are not qualified social scientists or practitioners of related disciplines that study the social institutional realities sustaining man-woman marriage's constitutionality.

5. The plaintiffs have plainly stated their intention to present their own evidence on the institution of marriage, evidence that is contrary to the marriage facts that the Coalition has already detailed and is ready, willing, and able to prove with admissible evidence.

6. The Nevada Attorney General's Office ("AGO") rather clearly has no intention to marshal the broad range of expert testimony needed to defend fully the Marriage Amendment's constitutionality or otherwise to get the marriage facts before this Court in admissible form. The other three government defendants, the clerks, have clearly indicated that they will be making no defense of the Marriage Amendment.

7. The Filings' purpose and effect is to prevent the Coalition – as the only party ready, willing, and able to present to this Court in admissible form the full range of evidence sustaining the constitutionality of the Marriage Amendment – from doing just that. If the

Coalition does not (because it is not allowed to) perform that work, that work will not get done.

II. Argument

1. The PSO should be rejected out of hand because it was done without the knowledge or input of the Coalition and, indeed, was done in hot haste exactly for the purpose of keeping the Coalition out of deliberations.

The plaintiffs drafted the PSO and orchestrated the stipulation of the "government defendants" to it in hot haste, without ever giving notice of any kind to the Coalition's counsel. This was so even though the Coalition's motion to intervene was already on file (and was, indeed, the first substantive filing by any defendant). This was so even though plaintiffs drafted the PSO with the purpose and intended effect of it binding the Coalition.[1] The Coalition's counsel first became aware of the PSO only when it was filed. Appendix 1 ("App.").

In these circumstances, this Court should reject the PSO out of hand and send the parties – all the parties, including the Coalition – back to the drawing board to come up with, if possible, a stipulated scheduling order and, if not that, at least a narrowing of the scheduling issues in dispute.

2. Any genuinely fair and sensible scheduling order in this case will allow adequate time for the parties to marshal and test (i) the broad range of expert testimony needed to defend fully the Marriage Amendment's constitutionality and (ii) any rebuttal expert testimony.

The just resolution of this case requires that the parties be able through discovery to marshal and test two categories of expert testimony: (i) that which the Coalition will be gathering in support of the constitutionality of the Marriage Amendment and (ii) that which the plaintiffs will be presenting in opposition. (The plaintiffs have already plainly stated their intent

[1] The plaintiffs' Opposition (D.I. 40) to our motion to intervene concedes that the Coalition should be a permissive intervenor but only under stringent proposed limitations – one being that the Coalition be bound by the PSO.

to provide evidence to this Court on the institution of marriage that counters our marriage facts.) Without adequate time for the parties to perform that work, there can be no just resolution of this case because there will be no adequate basis on which to assess society's interests sustaining the constitutionality of man-woman marriage.

For the Coalition – the only defendant willing to do the work – to marshal and prepare for their depositions the numerous experts required to cover all facets of the marriage facts (that is to disclose experts and expert reports), it will need at least six months, for several good reasons. One, we will be dealing with at least six consulting experts and at least an equal number of retained testifying experts. Two, prior to the filing of the Complaint we had no warning of the need to be about marshalling expert testimony, and most all our time since then, necessarily, has been devoted to fighting the intervention battle. Accordingly, although we have a list of about two dozen potential expert witnesses, we have been able to contact none of them yet and therefore will be starting from scratch. Three, although the Coalition's legal team has deep experience relative to litigation of the marriage issue, that team is much, much smaller than plaintiffs' legal team; the Coalition's legal team can be spread only so thin. App. 1-2.

There is another aspect of expert testimony that bears on deadlines in a sensible scheduling order. Some important parts of the marriage facts are evidenced by the work-product of academics, few if any of whom may be willing to testify as an expert retained by the Coalition. That is because on most American campuses the pro-genderless marriage ideology is so pervasive and so hotly embraced that even academics personally sympathetic to the Coalition's cause are literally intimidated into silence. Yet if their testimony is relevant and important to the issue in this case, this Court is entitled to that testimony. After all, "'the public . . . has a right to every man's evidence,'" except for those persons protected by a constitutional,

common-law, or statutory privilege," and there is no privilege for expert testimony. *Kaufman v. Edelstein*, 539 F.2d 811, 820 (2nd Cir. 1976). Rule 45(c)(3)(B), FRCP, provides the mechanism and safeguards for getting by deposition the testimony of an unretained expert. Use of that rule to actually get such testimony is a burdensome endeavor, and we intend to use it only in the most necessary situations, but we do intend to use it when necessary. It is not possible right now to assess the impact of this reality on the completion of discovery, but the reality is just that, a reality, and merits noting in this context. App. 2-3.

Accordingly, no fair scheduling order will put a deadline on the disclosure of experts and expert reports that is any sooner than six months after this Court enters its order granting the Coalition's motion to intervene – and disclosure of rebuttal experts and expert reports two months later. A fair scheduling order will also allow an additional four months thereafter for the depositions of the retained experts. That means a discovery cut-off of about twelve months from the Coalition becoming a party by intervention. This case could be to trial – one held on a fair basis – next summer.

In assessing the fairness of any proposed scheduling order, it is important to keep in mind how the Coalition stands vis-à-vis the other parties. The plaintiffs' legal team is exceedingly large and very well funded and has had many, many months, even years, to prepare for this litigation, including marshalling of expert testimony. The AGO has no intent to marshal expert testimony (or, it appears, little if any other admissible evidence of any kind), and the clerks have declined to mount a defense of the Marriage Amendment.

Finally, in assessing the fairness of any proposed scheduling order, it seems right that there be no rush to judgment on man-woman marriage, a vital social institution that has served

humankind so well for millennia. That institution, represented here by Nevada's Marriage Amendment, deserves better.

3. The PSO is neither fair nor sensible because its purpose and intended effect is to prevent any defendant, as a practical matter, from marshaling even a minor part of the expert testimony essential to the just resolution of this action.

The PSO provides that within just a few weeks the parties face a deadline to file summary judgment motions – specifically, 21 days from when this Court rules on the pending motion to dismiss and the pending motion to intervene. (For ease of reference, the PSO is attached in the Appendix.) The PSO then gives opposing parties (read "the Coalition") just 60 days for "expert discovery," which coincides with the 60-day deadline for filing an opposition to the summary judgment motion. That "expert discovery" apparently includes deposing experts whose work-product is used in a summary judgment motion and scrambling to find rebuttal experts. In any event, the clear intent here is to preclude any Rule 56(f) motion. If this Court denies the motion for summary judgment, then the final discovery cut-off is 90 days later. The "disclosure of experts and expert reports" deadline, however, is just 30 days after that denial and the "disclosure of rebuttal experts and their reports" deadline is a mere 30 days later. That leaves 30 days before the discovery cut-off to do all the depositions.

All this means that "expert discovery" of any meaningful kind is limited to a 60-day window beginning in just a few weeks and then a 30-day window at the very end of discovery.

The PSO's content makes our case that its purpose and intended effect is to prevent the Coalition – as the only party ready, willing, and able to present to this Court in admissible form the full range of evidence sustaining the constitutionality of the Marriage Amendment and to rebut the plaintiffs' contrary evidence – from doing just that.

III. Conclusion.

In light of all the foregoing, we respectfully request that this Court reject the PSO and either (i) send ***all*** the parties to the drawing board to come up with, if possible, a stipulated scheduling order and, if not that, at least a narrowing of the scheduling issues in dispute or (ii) enter a scheduling order with these deadlines: disclosure of experts and their reports, six months thereafter; disclosure of rebuttal experts and their reports, two months after that; discovery cut-off, four months after that.

June 8, 2012

Monte Neil Stewart (Nevada Bar No. 1459)

APPENDIX IN SUPPORT OF

OBJECTION TO PROPOSED SCHEDULING ORDER

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SECOND SUPPLEMENTAL AFFIDAVIT OF MONTE NEIL STEWART

State of Idaho)
) ss
County of Ada)

I, Monte Neil Stewart, being first duly sworn testify of my own personal knowledge that:

1. I am one of the lawyers representing the Coalition for the Protection of Marriage ("Coalition") relative to *Sevcik et al. v. Sandoval, etc., et al.*, Case No.: 2:12-cv-00578-RLH-PAL, United States District Court for the District of Nevada ("this case").
2. This affidavit (A) supplements (i) my affidavit filed in this action as part of the Appendix in Support of the Coalition's Motion to Intervene (D.I. 30; App. 18-33) and (ii) my supplemental affidavit filed in this action as part of the Supplement Appendix in Support of the Coalition's Reply in Support of the Coalition's Motion to Intervene (filed simultaneously with this filing) and (B) incorporates here in full the contents of those two affidavits.
3. Since I became the Coalition's lawyer less than a month ago, most all my time in this case has been devoted to fighting the intervention battle. I have, however, been able to devote some time to analyzing potential expert testimony in this case and in the process have come up with a list of about two dozen experts that, in my judgment, should be approached on behalf of the Coalition. Because of the work on the intervention issue, the Coalition's legal team has not been able to begin that other task. We will begin that task in the coming days, even before the Court rules in this case on whether the Coalition will have any meaningful role in discovery, fact development, and evidence presentation.

4. I anticipate that, in marshaling the full range of marriage facts supportive of the constitutionality of the Marriage Amendment, we will be working with at least six consulting experts and an equal number of experts retained to testify.
5. Prior to my becoming the Coalition's lawyer in this case less than a month ago, neither I nor any other member of the legal team nor the Coalition itself had any warning about the need to perform the tasks specified in the previous two paragraphs.
6. The Coalition's legal team has deep experience relative to litigation of the marriage issue but is relatively small. For a number of important tasks, such as depositions of experts, I should take the lead in doing them.
7. I know through my prior work on the marriage issue that some important parts of the marriage facts are evidenced by the work-product of academics; that few if any of those academics may be willing to testify as an expert retained by the Coalition; and that this is so because on most American campuses the pro-genderless marriage ideology is so pervasive and so hotly embraced that even academics personally sympathetic to the Coalition's cause are literally intimidated into silence. I have researched the process under Rule 45(c)(3)(B), FRCP, for getting by deposition the testimony of an unretained expert and have determined that use of that rule to actually get such testimony is a burdensome endeavor; accordingly, we intend to use the rule only in the most necessary

situations, but we do intend to use it when necessary. It is not possible right now to assess the impact of this reality on the completion of discovery.

Monte Stewart

SUBSCRIBED AND SWORN TO before me June 8th, 2012.

TAMMI KILDOW NOTARY PUBLIC STATE OF IDAHO

Notary Public
Residing at Boise, ID
My Commission Expires: 12/21/13

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BEVERLY SEVCIK and MARY BARANOVICH; ANTIOCO CARRILLO and THEODORE SMALL; KAREN GOODY and KAREN VIBE; FLETCHER WHITWELL and GREG FLAMER; MIKYLA MILLER and KATRINA MILLER; ADELE TERRANOVA and TARA NEWBERRY; CAREN CAFFERATA-JENKINS and FARRELL CAFFERATA-JENKINS; and MEGAN LANZ and SARA GEIGER,

Plaintiffs,

No. 2:12-CV-00578-RCJ-PAL

STIPULATED DISCOVERY PLAN AND SCHEDULING ORDER

SPECIAL SCHEDULING REVIEW REQUESTED

v.

BRIAN SANDOVAL, in his official capacity as Governor of the State of Nevada; DIANA ALBA, in her official capacity as Clerk for Clark County; AMY HARVEY, in her official capacity as Clerk for Washoe County; and ALAN GLOVER, in his official capacity as Clerk-Recorder for Carson City,

Defendants.

SPECIAL SCHEDULING REVIEW REQUESTED

1. Special Scheduling Review Is Requested. The parties wish to proceed expeditiously to the merits of this matter and agree, as described further below, that if the pending motion to dismiss filed by Defendant Brian Sandoval and joined by Defendant Alan Glover is denied, any party wishing to file a motion for summary judgment will do so within 21 days following any denial of the pending motion to dismiss, or within 21 days following the ruling on the pending motion to intervene, whichever is later in time. The parties further agree that in the event that all motions for summary judgment are denied by the Court, the parties will proceed based upon the schedule described below, which is contingent on the date of the Court's disposition of the motions for summary judgment. Once dates certain are known, Plaintiffs will file an updated discovery plan and scheduling order within five days. Because the proposed schedule may potentially cause the discovery cut-off to occur more than 180 days from the date that the first defendant appeared, the parties respectfully request special scheduling review of their proposed schedule.

2. Meeting. Pursuant to Fed. R. Civ. P. 26(f) and LR 26-1(a), a meeting was held on May 24, 2012, and was attended by Tara Borelli, Peter Renn, Melanie Cristol and Kelly Dove on behalf of all Plaintiffs; and C. Wayne Howle for Defendant Brian Sandoval; Herbert B. Kaplan for Defendant Amy Harvey; and Randal R. Munn for Defendant Alan Glover. Plaintiffs' counsel conferred separately with Michael Foley, counsel for Defendant Diana Alba.

3. Discovery Plan. The parties jointly propose to the Court the following discovery plan:

(a) Initial Disclosures. The parties have until June 7, 2012, 14 days after the LR 26-1(d) and Fed. R. Civ. P. 26(f) meeting was held, to serve their initial disclosures on all parties pursuant to Fed. R. Civ. P. 26(a)(1).

(b) Subject of Discovery. Plaintiffs are eight same-sex couples who allege that Defendants' exclusion of them from the ability to marry, or to have a valid marriage from another jurisdiction recognized as a marriage, violates the guarantees of equal protection based on sexual orientation and sex under the Fourteenth Amendment to the United States Constitution. To the extent that any discovery occurs before the filing of cross-motions for summary judgment, the parties anticipate that the following issues may be subject to discovery: the factual bases of Plaintiffs' claims, any governmental interests that any Defendant may advance as a rationale for the exclusion of Plaintiffs from marriage, and any other defenses that Defendants may raise.

(c) Motions for Summary Judgment. As noted above, if the pending motion to dismiss is denied, any party wishing to file a motion for summary judgment shall do so within 21 days after a denial of the pending motion to dismiss, or 21 days following the ruling on the pending motion to intervene, whichever is later in time. The parties also respectfully request that any responsive opposition brief be due 60 days after the filing of the motion, so as to permit the standard period of time provided by LR 26-1(e)(3) for expert discovery, if any is necessary. The parties agree that reply briefs may be filed within 30 days after opposition briefs are due.

(d) Other Dispositive Motions. In the event that all motions for summary judgment filed pursuant to paragraph 3(c) are denied, the parties shall have until 30 days after the discovery cut-off date described below to file any other dispositive motions. This does not exceed the limit of 30 days following the discovery cut-off date that LR 26-1(e)(4) presumptively sets for filing dispositive motions.

(e) Discovery Cut-Off Dates. In the event that all motions for summary judgment filed pursuant to paragraph 3(c) are denied, the parties agree that the discovery cut-off date will be 90 days from the date of the Court's last disposition of any party's motion for summary judgment.

(f) Fed. R. Civ. P. 26(a)(2) Disclosures (Experts). Disclosure of experts shall

proceed according to LR 26-1(e)(3), which provides that:

(1) The disclosure of experts and expert reports shall occur 60 days before the discovery cut-off date; and

(2) The disclosure of rebuttal experts and their reports shall occur 30 days before the discovery cut-off date.

4. Other items.

(a) Amending the Pleadings and Adding Parties. The parties have until 75 days before the discovery cut-off date to file any motion to amend the pleadings or to add parties.

(b) Interim Status Report. The undersigned counsel certify that they have read LR 26-3 and that the parties shall file the interim status report required by LR 26-3 not later than 60 days before the discovery cut-off date.

(c) Settlement. The issue of whether settlement discussion is appropriate was addressed, and given the nature of the case, none of the parties believes that this case is amenable to a resolution through settlement.

(d) Pretrial Order. The pretrial order shall be filed by 30 days after the date set for filing dispositive motions in the case. This case is suspended if the dispositive motions are timely filed. The disclosures required by FRCP 26(a)(3) shall be made in the joint pretrial order.

(e) Court Conference. The parties do not request a conference with the Court before entry of the scheduling order.

(f) Later Appearing Parties. If an additional defendant should appear, Plaintiffs shall serve a copy of this discovery plan and scheduling order within five days after such defendant becomes a party to the case. This discovery plan and scheduling order shall apply to such later-appearing parties, unless the Court, on motion and for good cause shown, orders otherwise.

(g) Extension or Modification of the Discovery Plan and Scheduling Order. LR 26-4 governs modifications or extensions of this discovery plan and scheduling order. Any stipulation or motion must be made not later than 21 days before the expiration of the subject deadline and comply fully with LR 26-4.

(h)(1) Clawback Agreement. In the event that any party (the "Discloser") produces material or documents without intending to waive a claim of privilege or confidentiality, the Discloser does not waive any claim of privilege or confidentiality if, within a reasonable amount of time after the Discloser actually discovers that such material or documents were produced, the Discloser notifies all other parties (the "Recipient(s)") of the inadvertent disclosure of privileged or confidential items, identifying the material or documents produced and stating the privilege or confidentiality provision asserted. Mere failure to diligently screen documents before producing them does not waive a claim of privilege or confidentiality.

(h)(2) If the Discloser asserts that it inadvertently produced privileged or confidential items in accordance with this Claw Back Agreement, the Recipient(s) must return the specified material or documents and any copies within ten days of the notification. The Recipient(s) must further permanently destroy any electronic copies of such specified material or documents and affirm in writing to counsel for the Discloser of such destruction.

(h)(3) In the event that the Recipient(s) contends the documents are not subject to privilege or confidentiality as asserted by the Discloser in accordance with this Claw Back Agreement, the Recipient(s) may, following the return and destruction described in paragraph (h)(2) above, challenge the privilege claim through a motion to compel or other pleading with the Court in which the litigation is currently pending. The parties agree that any review of items by the judge shall be an in camera review.

(h)(4) Should the Recipient(s) not challenge the Discloser's claim of privilege or confidentiality, or should the presiding judge determine that the documents are in fact subject to privilege or confidentiality, the documents, or information contained therein or derived therefrom, may not be used in the litigation or against the Discloser in any future litigation or arbitration brought by the Recipient(s). Nothing contained within this Claw Back Agreement shall be deemed to waive any objection that any party may wish to assert under applicable state or federal law.

(i) Privilege. No party by virtue of this agreement waives any claim of privilege or right to seek a protective order on grounds of privilege.

Dated: June 1, 2012

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

/s/ Tara L. Borelli
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Attorneys for Defendant Diana Alba

ORDER

IT IS SO ORDERED.

Dated: _____, 2012.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I will electronically file the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system on June 1, 2012. All participants in the case are registered CM/ECF users, and will be served by the CM/ECF system.

By: /s/ Jamie Farnsworth
Jamie Farnsworth
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Los Angeles, CA 90010

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2012, the foregoing document was filed with the Clerk of the Court for the United States Court, District of Nevada by using the CM/ECF system on June 8, 2012. The following parties received copies electronically:

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